State of Rhode Island and Providence Plantations

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

December 09, 2016
OM 16-14
PR 16-51

Mark McBurney, Esquire

RE: Clark v. West Glocester Fire District

Dear Attorney McBurney:

The investigation into your Open Meetings Act ("OMA") and Access to Public Records Act ("APRA") complaints filed on behalf of your client, Mr. Trevor Clark, against the West Glocester Fire District ("WGFD") on February 25, 2014, is complete.

You allege that the WGFD violated the OMA and the APRA in the following ways:

> "1. On 1/27/14, the WGFD first posted its RIGL [§] 42-46-6(a) annual notice of meetings – 20 days after its first meeting of 2014 (on 1/7/14), violating RIGL [§] 42-46-6(a).
>
> 2. The WGFD posted on the Secretary of State's website notice of a 1/27/14 meeting ('SPECIAL NOTE: This is an annual meeting') at 7:30 pm. The WGFD posted 'supplemental' notice of this 1/27/14 meeting just 10 hours earlier. Furthermore, the WGFD's charter (Section 3) requires annual meetings to be held on the third Saturday of June every year. The WGFD violated its charter and RIGL [§] 42-46-6(b) 'supplemental notice' requirements.[1]
>
> 3. On 2/4/14, the WGFD convened a closed Executive Session and thereafter 'sealed' the minutes therefrom (attached). That effort failed, because the WGFD failed to nominate the specific applicable subsection of RIGL [§] 42-46-5(a) 1–10. Furthermore, that effort also failed because the minutes failed to indicate with

[1] This Department only has jurisdiction to investigate violations of the APRA. See R.I. Gen. Laws § 38-2-8(b); see also McQuade v. Rhode Island State Police, PR 13-03. Accordingly, alleged violations of the WGFD's charter will not be investigated.

> clarity what Board members were present; failed to state with clarity what constituted a majority of the [m]embers present;[2] failed to state with clarity the individual votes of Board members to go into Executive Session; and failed to state with clarity the individual votes of Board members to seal minutes thereafter. The 'sealed' minutes were not properly sealed and accordingly are public records. ***
>
> 4. WGFD letter dated 2/19/13 (sic) (attached) identifies Angela Taylor as the only person within the WGFD to receive Title 38 orientation and training, the only person to submit a RIGL [§] 38-2-3.16 'Certificate of Compliance,' and the only person authorized to grant or deny APRA requests (attached, at response # 5). However, WGFD APRA responses on the following dates were not signed or authorized by Ms[.] Taylor, and instead were adjudicated by people without Title 38 orientation or training, who had not filed RIGL [§] 38-2-3.16 Certificates of Compliance, and had no authority to rule on APRA requests – in violation of RIGL [§] 38-2-3.16:
>
> 1. 11/7/13
> 2. 1/9/14
> 3. 1/15/14
> 4. 1/25/14
> 5. 2/17/14"

This Department notified you in an April 17, 2014 letter of the following:

> "With respect to allegations one and two, you present no evidence that Mr. Clark was unable to attend (or unaware) of the January 27, 2014 meeting, or was otherwise aggrieved by this allegation. You may wish to supplement your complaint to provide evidence concerning how Mr. Clark was aggrieved by this allegation and alleged violation."

You did not provide any additional information in response to this prompt.

The WGFD filed its substantive response on May 21, 2014. The substantive response addressed your allegations, in pertinent part, as follows:

> **"1. R.I. Gen. Laws § 42-46-6(a): posting its annual notice in an untimely manner on January 27, 2014, after its first meeting on January 7, 2014.**
>
> R.I. Gen. Laws § 42-46-6(a) merely requires that the annual notice be posted by '. . . the beginning of the calendar year.' We submit that January 27, 2014 was

[2] In our April 17, 2014 acknowledgment letters to you and the WGFD we noted that "the allegation that the [WGFD] failed to indicate what constitutes a majority of the members present does not implicate the OMA and will not be reviewed[.]"

sufficiently close to the beginning of the calendar year to fulfill this requirement. The statute does not require that the notice be posted prior to the first meeting of the year.

We therefore submit that the Open Meeting[s] Act was not violated. In addition, please also note that the January 7, 2014 meeting was properly posted.

We also observe that the regular meetings have historically been held on the first Tuesday of the month.

2. R.I. Gen. Laws § 42-46-6(b): posting notice of its January 27, 2014 annual meeting in an untimely manner without 48 hours supplemental notice.

The posting in question was not the notice of the annual meeting. It was the notice of [the] regular meeting calendar. There was no meeting on January 27, 2014. ***

3. R.I. Gen. Laws §§ 42-46-4, -5: The WGFD's February 4, 2014 open session minutes failed to include the subsection under which the WGFD convened into executive session, failed to indicate the members present, failed to disclose the individual votes to convene into executive session, and failed to indicate the individual votes to seal the executive session minutes. Accordingly, Mr. Clark contends the executive session minutes should be disclosed.

The minutes which were posted on the website at the time of Mr. McBurney's complaint were draft minutes posted pursuant to R.I.G.L. § 42-46-7(b)(2), not final minutes. [] Therefore, the complaint is premature.

In any case, the minutes do indicate who were present – all three minutes [sic] of the Board. The minutes also indicate that all 3 members voted to go into executive session and to seal the minutes. In addition, the minutes clearly state the reason for convening into the meeting. The final minutes will include the subsection relied upon.

4. R.I. Gen. Laws § 38-2-3.16: responding to APRA requests dated November 7, 2013, January 9, 2014, January 15, 2014, January 25, 2014, and February 7, 2014 without having the responding person certified to respond to APRA request or authorized by a person certified to respond to APRA requests.

Mr. McBurney cites no statutory authority for the proposition that only the APRA requests may only be fulfilled by certain persons. The District takes the position that there is no such requirement. In fact, R.I.G.L. § 38-2-3(d) states that the unavailability of a designated public records officer will not serve as good cause for failure to timely respond to an APRA request. This language thus contemplates that from time to time, persons other than the certified records officer will respond

> to APRA requests. This would be particularly true for small rural operations such as the District. Moreover, Mr. McBurney fails to demonstrate any prejudice resulting from having individuals other than a designated public records officer respond.
>
> We also observe that all of Mr. McBurney's requests had to do with pending or threatened litigation. Therefore, it was entirely proper for the District's attorney to respond. In addition, the pending or threatened litigation potentially involved the individual who was certified as a public records officer. For that reason, it was prudent to have an individual other than the public records officer respond, in this case, Ms. Lowell. Please also note that Ms. Lowell herself became certified in March, 2014."

The WGFD's substantive response also contained an affidavit from Chairman of the WGFD Board William J. Flynn, Jr. averring that the factual allegations made in the substantive response were true.

We acknowledge your rebuttal.[3]

At the outset, we note that in examining whether a violation of the OMA or APRA has occurred, we are mindful that our mandate is not to substitute this Department's independent judgment concerning whether an infraction has occurred, but instead, to interpret and enforce the OMA and the APRA as the General Assembly has written these laws and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the WGFD violated the OMA and the APRA. See R.I. Gen. Laws §§ 42-46-8; 38-2-8. In other words, we do not write on a blank slate.

Your first two allegations concern the WGFD's failure to timely post its annual notice and its alleged supplemental notice for its January 27, 2014 meeting. Before this Department can address these allegations raised in your complaint, we must determine as a threshold matter whether you are an aggrieved party and have legal standing to bring these OMA complaints. Indeed, this

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[3] To the extent that your rebuttal alleges any additional violations of the OMA not already raised in your initial complaint, such new allegations will not be addressed. As stated in this Department's acknowledgment letter to you dated April 17, 2014, "Your rebuttal . . . should not raise new issues that were not presented in your complaint[.]" See also Save the Bay v. Department of Environmental Management, PR 15-19. The acknowledgment letter also stated that "after this opportunity to respond [via rebuttal], neither party will be allowed additional response without permission or inquiry from this Department." We neither granted permission, nor did we inquire about either party filing additional responses. Therefore, the WGFD's additional email correspondence of May 29, 2014 and your supplemental rebuttal dated June 2, 2014 will not be considered.

Department's April 17, 2014 acknowledgment letter to you requested that you supply evidence demonstrating that Mr. Clark was aggrieved by the allegations raised in your complaint.

The OMA provides that "[a]ny citizen or entity of the state who is aggrieved as a result of violations of the provisions of this chapter may file a complaint with the attorney general." R.I. Gen. Laws § 42-46-8(a). In Graziano v. Rhode Island State Lottery Commission, 810 A.2d 215 (R.I. 2002), the Rhode Island Supreme Court examined the "aggrieved" provision of the OMA. There, an OMA lawsuit was filed concerning notice for the Lottery Commission's March 25, 1996 meeting wherein its Director, John Hawkins, was terminated. At the Lottery Commission's March 25, 1996 meeting, Mr. Hawkins, as well as his attorney, Ms. Graziano, were both present. Finding that the Lottery Commission's notice was deficient, the trial justice determined that the Lottery Commission violated the OMA and an appeal ensued.

On appeal, the Rhode Island Supreme Court found that it was unnecessary to address the merits of the OMA lawsuit because "the plaintiffs Graziano and Hawkins have no standing to raise this issue" since "both plaintiffs were present at the meeting and therefore were not aggrieved by any defect in the notice." Id. at 221. The Court continued that it:

> "has held on numerous occasions that actual appearance before a tribunal constitutes a waiver of the right of such person to object to a real or perceived defect in the notice of the meeting. * * * It is not unreasonable to require that the person who raises the issue of the defect in notices be in some way disadvantaged or aggrieved by such defect. While attendance at the meeting would not prevent a showing of grievance or disadvantage, such as lack of preparation or ability to respond to the issue, no such contention has been set forth in the case at bar. The burden of demonstrating such a grievance is upon the party who seeks to establish standing to object to the notice." Id. at 221–22.

Here, pursuant to R.I. Gen. Laws § 42-46-8(a), and the standard established in Graziano, you must demonstrate that your client is "in some way disadvantaged or aggrieved by such defect" in the notice. Id. at 221. Respectfully, despite our suggestion to do so, you have not provided us with any evidence that Mr. Clark was aggrieved by the alleged lack of notice in the two instances you point out. Since you have presented no evidence to the contrary, and because we find no evidence indicating otherwise, this Department finds that Mr. Clark is not an "aggrieved" party and therefore has no standing to object to the notice. See Curt-Hoard v. Woonsocket School Board, OM 14-20. Accordingly, we find no violation.[4]

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[4] It bears noting that the evidence demonstrates that no meeting occurred on January 27, 2014, but rather this was the date that the WGFD posted its notice for regularly scheduled meetings. Indeed, this notice indicates that the WGFD meetings would be held on the first Tuesday of each month. Even your rebuttal readily acknowledges "[t]he truth of the matter is that the WGFD never intended to have a meeting [on] 1/27/14."

You next allege that the WGFD violated the OMA during its February 4, 2014 meeting by improperly convening into executive session in violation of R.I. Gen. Laws § 42-46-4(a). Specifically, you contend that the open session minutes failed to include the subsection under which the WGFD convened into executive session, failed to indicate the members present, failed to disclose the individual votes to convene into executive session, and failed to indicate the individual votes to seal the executive session minutes.

Rhode Island General Laws § 42-46-4(a) provides, in relevant part:

> "By open call, a public body may hold a meeting closed to the public upon an affirmative vote of the majority of its members. A meeting closed to the public shall be limited to matters allowed to be exempted from discussion at open meetings by § 42-46-5. The vote of each member on the question of holding a meeting closed to the public and the reason for holding a closed meeting, by a citation to a subdivision of § 42-46-5(a), and a statement specifying the nature of the business to be discussed, shall be recorded and entered into the minutes of the meeting." (Emphasis added).

The unofficial minutes for the February 4, 2014 meeting provide, in pertinent part:

> "Board present: Open Call
>
> William Flynn,
> Bill Reichert
> Tom Taylor
>
> Angela Taylor, Chief LaButti, Deputy Chief Brian Mckay [sic]
> Janice Lowell
> ***
> New Business: Motion made by Bill Flynn seconded by Bill Reichert to adjourn to executive session at 19:50, on legal issues[.] Motion passed; Tom Taylor, Bill Flynn, Bill Reichert[.] Meeting will reconvene at 20:05[.]
>
> Meeting reconvened at 20:05.
> At this time Bill Flynn made a motion to seal the executive session minutes, seconded by Bill Reichert, Motion passed 3 Board members, Bill Flynn, Bill Reichert, Tom Taylor[.]"

The unofficial minutes clearly state that board members Messrs. William Flynn, Bill Reichert, and Tom Taylor were present, along with Ms. Angela Taylor, Chief LaButti, Deputy Chief Brian McKay, and Ms. Janice Lowell. The unofficial minutes also list the three board members that approved the motion to adjourn to executive session and note that all three board members approved the motion to seal the executive session minutes. See R.I. Gen. Laws § 42-46-4(a). With respect to your allegations concerning the WGFD's failure to indicate the members present, failure

to disclose the individual votes to convene into executive session, and failure to indicate the individual votes to seal the executive session minutes, we find no violation.

However, the unofficial minutes do not enumerate a specific subdivision of § 42-46-5(a). This omission is corrected in the official minutes, posted with the Secretary of State on May 27, 2014, after you filed the instant complaint.[5] Although R.I. Gen. Laws § 42-46-4(a) does not expressly state that the "open call" requirements must be met in the unofficial minutes, as opposed to the official minutes, we find that any other reading of the statute would contravene its purpose. Accordingly, because the unofficial minutes for the February 4, 2014 meeting did not contain "a citation to a subdivision of § 42-46-5(a)[,]" we find that the WGFD violated the OMA.

Upon a finding that a complaint brought pursuant to the OMA is meritorious, the Attorney General may initiate suit in the Superior Court. R.I. Gen. Laws § 42-46-8(a). There are two remedies available in suits filed under the OMA: (1) "[t]he court may issue injunctive relief and declare null and void any actions of a public body found to be in violation of [the OMA];" or (2) "the court may impose a civil fine not exceeding five thousand dollars ($5,000) against a public body or any of its members found to have committed a willful or knowing violation of [the OMA]." R.I. Gen. Laws § 42-46-8.

In this case, we find neither remedy appropriate, particularly in light of the fact that the WGFD corrected the omission in its official minutes See Tanner v. Town Council of Town of East Greenwich, 880 A.2d 784, 802 (R.I. 2005) ("Although a public body may be held accountable for violations of the OMA, it ought not to be further penalized when it takes appropriate corrective measures."); see also Palazzo v. Warwick School Committee, OM 06-33. It also bears noting that the WGFD's unofficial minutes, while omitting the (a)(2) subsection designation, did indicate that the executive session was convened "on legal issues," a clear reference to R.I. Gen. Laws § 42-46-5(a)(2), which permits an executive session for "[s]essions pertaining to collective bargaining or litigation, or work sessions pertaining to collective bargaining or litigation." We additionally note that we have not been presented with any evidence to support a finding of a willful or knowing violation. Accordingly, we decline to take further action with respect to this violation. Nonetheless, this finding serves as notice to the WGFD that its omission violated the OMA and may serve as notice of a willful or knowing violation for any future similar cases.

You next allege that the WGFD violated by the APRA in its November 7, 2013, January 9, 2014, January 15, 2014, January 25, 2014, and February 17, 2014 APRA responses to your various APRA requests by not having the responding person certified to respond to APRA requests

[5] The official minutes state, in relevant part: "Motion made by Bill Flynn, seconded by Bill Reichert to adjourn to executive session at 19:50, on legal issues pursuant to RIGL Section 42-46-5(a)(2)[.]"

pursuant to R.I. Gen. Laws § 38-2-3.16. The WGFD responds that the APRA contains no such requirement.

As an initial matter, we note that neither the January 15, 2014 nor the January 25, 2014 APRA responses make any mention of the current complainant, Mr. Clark.[6] While the January 25, 2014 APRA response does not indicate to whom it is being sent, the January 15, 2014 APRA response is very clearly sent to you, Mark McBurney, Esquire. As discussed in our prior findings, a complainant lacks standing to pursue an APRA complaint if he or she was not the one who made the APRA request. See Clark v. Town of Glocester / Clark v. Glocester Police Department, PR 16-12. Because no evidence has been presented that Mr. Clark made the APRA requests that resulted in the January 15, 2014 or January 25, 2014 APRA responses, we find that Mr. Clark lacks standing to bring complaints regarding those APRA responses.

The foregoing analysis also largely controls our analysis regarding the WGFD's November 7, 2013, January 9, 2014, and February 17, 2014 responses. Unlike the above, all of these responses do reference Mr. Clark, but again, the underlying APRA requests have not been supplied to us to determine whether Mr. Clark made the APRA requests that precipitated the WGFD's response upon which you complain. This is exemplified by Clark v. West Glocester Fire District, PR 16-50 where you filed a separate APRA complaint, on behalf of Mr. Clark. In Clark, PR 16-50, we determined that Mr. Clark lacked standing to complain about the WGFD's February 17, 2014 response, and in any event, the February 12, 2014 request that precipitated the February 17, 2014 response did not fall within the ambit of the APRA. Having made those determinations in Clark, PR 16-50, those conclusions are dispositive of the current—yet separately filed—complaint regarding the WGFD's February 17, 2014 response.

We also note that both the November 7, 2013 and January 9, 2014 APRA responses have been previously addressed by this Department in the context of complaints you filed on January 29, 2014 and February 3, 2014, respectively, against the WGFD. See Clark v. West Glocester Fire District, PR 14-29; see also Clark v. West Glocester Fire District, PR 15-01. In these two findings we discussed and resolved your allegations pertaining to the November 7, 2013 and January 9, 2014 APRA responses. Id. As we have previously noted, the piecemeal filing of separate complaints relating to the same APRA request is discouraged. See Clark v. West Glocester Fire District, PR 14-29, n.1. To allow multiple and separate complaints regarding the same APRA request would invite duplicative investigations by this Department, contravening administrative economy and finality. For all of these reasons, we find no APRA violations.

Although the Attorney General will not file suit in this matter, nothing within the APRA prohibits an individual or entity from obtaining legal counsel for the purpose of instituting injunctive or

[6] We additionally note that the underlying APRA requests that produced these APRA responses—which form the basis of your complaint—were not provided to us. We are generally disinclined to investigate allegations of APRA violations where we are not provided the APRA request, or other relevant documents, that precipitated the complaint.

declaratory relief in Superior Court. See R.I. Gen. Laws § 38-2-8(b). We are closing this file as of the date of this correspondence.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,

Sean Lyness
Special Assistant Attorney General

SL/kr

Cc: Noelle K. Clapham, Esq.